BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALFONSO DESANTIAGO	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,021,558
MIES CONSTRUCTION, INC.	)	
Respondent	)	
AND	)	
	)	
BUILDERS' ASSOCIATION SELF-INSURERS' FUND OF KANSAS	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 8, 2005 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was authorized to receive medical treatment, with respondent being ordered to provide a list of three physicians from which claimant could then select a treating physician. In addition, all medical was ordered paid, including unauthorized medical treatment up the statutory limit. Further, temporary total disability payments were ordered paid to claimant "if the claimant is taken off work."[1]

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of his employment through a series of accidents suffered each and every working day through February 7, 2005?

2. Did claimant provide timely notice of accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant went to work for respondent as a laborer in March 2002. The work he performed for respondent was heavy physical labor, involving pushing and lifting activities. This work involved lifting water pipes and also moving concrete pipes using a bar or a

[1] Preliminary hearing Order (April 8, 2005).

lever. These various pipes weighed from 30 pounds to several hundred pounds. He did that strenuous work constantly during the day. Claimant continued to perform those activities until being restricted to light duty by Alberto F. Carro, M.D., in February 2005.

For the entire year of 2004, claimant was suffering from low back pain. On April 27, 2004, claimant went to see Dr. Carro regarding his back problems. Claimant testified that at that time, the pain was not the same as what he has now, because, at that time, the pain was intermittent.

Claimant testified that for a period of approximately a year and a half leading up to the preliminary hearing, the pain got worse, that it was "kind of in stages."[2]

Claimant did not report his back complaints to his supervisors at respondent in 2004. He did, however, tell two or three of his co-workers who then helped claimant.

In November 2004, the pain was worse, so claimant returned to Dr. Carro, seeing him on November 10 and then again on November 18. The November 10 nurse's note indicated claimant complained of having low back pain for five days. In that nurse's note, there is a comment stating "no known injury." Dr. Carro did not discuss with claimant on November 10 any history of onset or any specific problems giving rise to his complaints. Dr. Carro stated that he does not always remember to ask those questions.

When Dr. Carro saw claimant on November 18, 2004, he questioned claimant about the kind of work he was performing. According to claimant's testimony, Dr. Carro, after hearing that claimant worked construction and did heavy lifting, determined that that was the cause of claimant's back problems. According to Dr. Carro's testimony, he talked to claimant on November 18, 2004, about restrictions, specifically about not working with pipes. In his report, he indicated that claimant "should decrease or stop pipe fitting."[3] Dr. Carro further testified that restrictions were medically indicated on that date, but that he did not assign restrictions on that date. It was his recollection that claimant did not want any restrictions to be put on him at that time because he was afraid he could get fired. In his testimony at preliminary hearing, claimant denied talking to Dr. Carro about restrictions on that date and denied telling Dr. Carro not to give him restrictions. Dr. Carro sent claimant for an MRI, which was performed on November 24, 2004. Dr. Carro did not read the MRI himself, but instead relied on the radiologist's report. According to that report, the MRI revealed a large left disc herniation at L5-S1, compressing the left S1 nerve root. After reviewing this report, Dr. Carro sent claimant for an epidural injection to his lower

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[2] Claimant's Depo. at 18.

[3] Carro Depo. at 31.

back, which claimant had on December 7, 2004. Dr. Carro denied advising claimant on November 18, 2004, to file a workers compensation claim.[4]

On February 7, 2005, claimant saw Dr. Carro a third time. It was at this visit that claimant first told Dr. Carro that he thought his low back problem was related to his work. Dr. Carro stated that claimant told him on February 7, 2005, that the reason he did not tell Dr. Carro on November 10 that his low back problems were related to his work was because he was "an illegal" and he was afraid he could get fired.[5] Dr. Carro acknowledged that he thinks that claimant knew all along that this was related to his work, but that claimant was just afraid to say that.

Dr. Carro restricted claimant to light duty on February 7, 2005. He opined that within a reasonable degree of medical probably or certainty, claimant's current low back complaints are the result of his work activities with respondent. Claimant testified that at the time that Dr. Carro gave claimant these restrictions, Dr. Carro also told claimant that this was a job-related accident. So claimant reported this to his supervisor, and on February 7 or 8, claimant took those restrictions to his employer. Claimant does not remember who he gave them to, but he thinks that he gave them to the safety manager. Claimant explained to the safety manager that Dr. Carro believed that work was causing his problems. At that point, claimant's job duties were changed. Up to that time, claimant had performed the same type of heavy physical labor work.

Claimant testified at his deposition that he first provided notice of accident to respondent on February 7 or 8, 2005. However, it appears that his first notice to respondent was actually on February 4, 2005. Claimant testified that on February 4, 2005, he told respondent that his back was hurting and that he believed it was work related. Claimant did not report this prior to that date because he felt that since it was not an injury, such as a fall or being struck, he thought that it was not an accident.

On February 4, 2005, claimant presented a Blue Cross/Blue Shield form to the foreman. This form, which was marked as an exhibit at claimant's deposition, indicated that claimant had had a back injury.[6] That is the first time that the company knew that claimant had some kind of back injury. That form, which was signed by claimant, was then given to the safety man on site on that same day and delivered to the office on February 7. On February 8, 2004, claimant was called to a meeting. At this meeting, claimant acknowledged that he knew the policy about reporting an accident, but felt that this was not an accident because it happened over time. After that February 8 meeting, claimant

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[4] *Id.* at 20.

[5] *Id.* at 23.

[6] Claimant's Depo., Exhibit 3.

was placed on light-duty work based on the restrictions of Dr. Carro. Claimant worked light duty through March 17, 2005.

Earl Mies, the president of respondent's company, provided testimony at the April 7, 2005 preliminary hearing that claimant's employment-related back problems were first brought to his attention on February 8, 2005. The first time that someone with the company was made aware of claimant's problems was on February 4, when the Blue Cross/Blue Shield form was given to the foreman.

Respondent terminated claimant on March 17 or 18, 2005, after finding out from claimant's testimony at his March 16, 2005 deposition that he was working illegally. On March 17, 2005, the day after providing his deposition testimony, claimant was called to the office and was given a paper and advised that he no longer had a job with respondent. Claimant was told that the reason for his termination was because "they noticed that I wasn't here legally."[7] Claimant does recall on one of the occasions when he saw Dr. Carro, that Dr. Carro asked him if he was in the country illegally and claimant told him no. At his deposition, claimant acknowledged that he is not a U.S. citizen and that he does not have a "green card".[8]

At the request of his attorney, claimant went to see George G. Fluter, M.D., for an IME on March 21, 2005. Dr. Fluter diagnosed (1) low back and bilateral leg pain; (2) disc protrusion with associated annular tear at L4-5; (3) left disc herniation at L5-S1 compressing the S1 nerve root; and (4) lumbar strain/sprain with a component of myofascial pain. He felt that at that time, claimant had not achieved maximum medical improvement. He restricted claimant's lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently. He restricted claimant to only occasional bending, stooping and twisting. He felt that claimant should avoid squatting, kneeling, crawling and climbing. He recommended further treatment, including epidural steroid injections, medications and physical therapy. He cautioned that, depending upon the response to treatment, consideration may be given to lower extremity electrodiagnostic studies and referral to a spine surgeon.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[9]

Respondent argues that claimant's date of accident should be November 18, 2004. Respondent contends that claimant's decision to not advise respondent of his ongoing

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[7] P.H. Trans. at 17.

[8] Claimant's Depo. at 5.

[9] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

difficulties artificially extended the date of accident to the February 7, 2005 date, thereby extending claimant's time for notice under K.S.A. 44-520. K.S.A. 44-520 requires notice be provided to an employer within ten days of the date of accident. When just cause is provided to justify a worker's failure to give notice within ten days as is required under K.S.A. 44-520, then the time for providing notice is extended to 75 days from the date of accident. Respondent argues that if the November 18, 2004 date of accident (when claimant first discussed his work-related activities with Dr. Carro and was advised that the heavy lifting was the cause of claimant's back problems) were utilized as the appropriate date of accident, then claimant's notice of accident to respondent on February 4, 2005, would be more than 75 days from November 18, 2004. Respondent does not argue that claimant did not suffer additional injury while he continued in his employment with respondent, but instead argues that the date of accident has been inappropriately manipulated by claimant.

While the Board understands respondent's arguments, the Board disagrees. Had claimant come forward in November regarding his difficulties after his discussion with Dr. Carro, then notice would have been provided at that time. All claimant's reluctance to come forward created was several more months of regular duty work, which caused claimant additional pain and trauma to his low back.

The issues raised by respondent hinge upon the appropriate date of accident in this case. The dispute over date of accident in a repetitive trauma case has had a long and colorful history in Kansas workers compensation litigation. The recent line of cases, beginning with *Berry*,[10] attempted to create a bright line rule when establishing the appropriate date of accident when microtrauma accidents are being litigated. A series of cases followed *Berry*, leading up to the Kansas Supreme Court decision in *Treaster.*[11] *Treaster* discussed at length the various cases beginning with *Berry,* when dealing with microtrauma injuries. The Supreme Court, in *Treaster*, ultimately determined that the *Berry* court, which required that the last day worked be applied as the date of accident, was the appropriate rule to follow. In *Treaster*, the court found that August 2, 1993, was the last day that that claimant worked at a job which had been the cause of her problems or injuries. It was found to be the appropriate date of accident for workers compensation purposes. The *Treaster* court found the date of accident to be the last day the claimant performed the earlier work tasks which disregarded attempts by either the claimant or the respondent to move a date of accident or occurrence to before or after an advantageous time for purely monetary or coverage reasons.[12] The court noted that the expected result

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[10] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[11] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[12] *Treaster* at 624.

of *Berry* was for workers to be allowed the latest possible date for the claim period to begin, not for claimants or respondents to try to pick a date of accident or occurrence that best served their financial purposes.[13]

In this instance, while claimant's reluctance to come forward subjected him to additional physical trauma and pain, it was nevertheless understandable under the circumstances as claimant acknowledged he was illegal and working in this country inappropriately. This information resulted in claimant losing his job with respondent. That was the ultimate result claimant hoped to avoid.

The Board finds that the date of accident logic of the *Berry/Treaster* line of cases should be applied in this instance, with claimant suffering accidental injury through February 7, 2005. As respondent acknowledges claimant provided notice of accident within ten days of the February 7 date, the Board finds that the determination to award claimant benefits for a series of accidents through February 7, 2005, should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge John D. Clark dated April 8, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 2005.

BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[13] *Treaster* at 623.